

EXPORT CONTROLS AND RESTRICTIONS ON RELEASE OF RESEARCH RESULTS:

HOW THE ISSUE ARISES COMPLIANCE STRATEGIES

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This outline is a companion to Joseph Dennin's outline entitled "Deemed Exports under the EAR and the ITAR." Mr. Dennin's outline provides a comprehensive explanation of the requirements of the EAR¹ and the ITAR², and the exemptions of which most universities avail themselves, including, in particular, the fundamental research exemptions. This outline therefore assumes that the reader is generally familiar with the export control regulations and their exemptions.

This outline focuses on ways in which university counsel face EAR and ITAR issues. It addresses the limitations of the fundamental research exemptions, and the fact situations in which they become inapplicable. It also discusses strategies for promoting institutional compliance with the EAR and ITAR.

I. How the issue arises for university counsel.

A. What the fundamental research exemption doesn't cover.

1. Research subject to sponsor restrictions on publishing the resulting information.

- a. The EAR fundamental research exemption allows institutions to provide sponsors the right to prepublication review for the following two purposes:
 - (i) "to insure that the publication would not inadvertently divulge proprietary information" of the sponsor. 15 CFR § 734.8(b)(2).
 - (ii) "to ensure that publication would not compromise patent rights, ... so long as the review causes no more than a temporary delay in publication." 15 CFR § 734.8(b)(3).

¹ Export Administration Regulations, 15 CFR Part 730 et seq.

² International Traffic in Arms Regulations, 22 CFR § 120 et seq.

Any additional restrictions destroy the fundamental research exemption

- b. Under ITAR, it is not clear that the above exemptions apply. The ITAR regs exclude from the definition of fundamental research “research the results of which are restricted for proprietary reasons.” 22 CFR § 120.11(a)(8). The section goes on to state that “University research will not be considered fundamental research if * * * the University or its researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity.”

Arguably, then, sponsor prepublication review rights for the purposes of protecting proprietary information and to allow brief delays for patent protection destroy the ITAR fundamental research exemption.

2. Restrictions in federal government research contracts under ITAR

- a. This is another area in which the EAR and the ITAR differ. Under the EAR, 15 CFR § 734.11, if research is funded by the federal government and “specific national security controls”³ are agreed on to protect resulting information, then a violation of those controls will violate the EAR, even if one of the EAR exemptions would otherwise apply. But, significantly, “any export or reexport of information resulting from the research that is consistent with the specific controls may nonetheless be made”

Thus, government contract restrictions on publication do not deprive resulting research of the fundamental research exemption, even if those same restrictions from a private sponsor would negate the fundamental research exemption. See also 15 CFR Supplement No. 1, Question E(1) which reemphasizes the point.

- b. The ITAR has nothing similar. Indeed, the ITAR exempts from the definition “research the results of which are restricted for ... specific U.S. Government access and dissemination controls.” 22 CFR §120.11(a)(8). So government publication restrictions deprive the research of its fundamental research exemption under ITAR.

3. Company proprietary information

- a. Release of proprietary information from a company to a university is not within scope of fundamental research exemption.
 - (i) The proprietary information is not “information *arising during or resulting from* fundamental research” (emphasis added), 15 CFR §

³ Including, for example, “prepublication review by the Government, with right to withhold permission for publication; restrictions on prepublication dissemination of information, or restrictions on participation of non-U.S. citizens or other categories of persons in the research. 15 CFR § 734.11(b).

734.3(b)(3), and so does not fall within the fundamental research exemption.

- (ii) “The initial transfer of information from an industry sponsor to university researchers is subject to the EAR where the parties have agreed that the sponsor may withhold from publication some or all of the information so provided.” 15 CFR § 734.8(b)(4). See on this point also 15 CFR § 734.8(b)(2), second sentence, and 15 CFR Part 734, Supplement No. 1, Question D(2), which makes clear that the while the university doesn’t lose the fundamental research exemption when the sponsor is granted prepublication review solely to make sure that its proprietary information won’t be divulged, the release of information from the sponsor to the university researchers is subject to the EAR under those circumstances.
- b. Even if the research itself is fundamental research, such that the results are exempt from the ITAR and EAR, the institution must manage the sponsor’s proprietary information within the confines of the ITAR and EAR rules.
 - (i) The release by the company to the institution of EAR/ITAR protected technology would violate the EAR and ITAR if covered foreign nationals would receive it. Note, too, that under General Prohibition Ten under the EAR, the university would know that this would be a violation for the company, so it would also be a violation for the university. See the discussion below under Section I.B (“When the sponsor violates the export control rules”).
 - (ii) Even if the initial release from the company to the university doesn’t violate the EAR or ITAR, further release of the proprietary information to foreign nationals in the course of the research would arguably be outside the fundamental research exemption.
 - (A) It would not be within the “public domain,” as required by the ITAR exemption, 22 CFR § 120.11, because it would not be published, nor generally accessible or available to the public, § 120.11(a)
 - (B) Similarly, it wouldn’t fit with EAR exemption, because it would not have “arise[n] during, or result[ed] from” fundamental research. 15 CFR § 734.3(b)(3).
 - (iii) ITAR exemption: The ITAR provides an exemption in these circumstances. 22 CFR § 125.4(b)(10). It allows the release of information to foreign employees under the following conditions:
 - (A) the employee is a full time “regular” and “bona fide” employee

- (B) the employee’s “permanent abode” is in the U.S. during the period of employment
- (C) the institution informs the employee in writing that the information may not be transferred to other foreign persons without the prior written approval of the Office of Defense Trade Controls. (It is not clear whether this applies to transfers between employees qualified under this section).
- (D) the employee is not a national of an embargoed country, and
- (E) the information is not classified.

4. Information that hasn’t yet been published.

Under the ITAR, there is a troublesome argument that the fundamental research exemption is limited to information that has already been published, even if it arises in the context of fundamental university research. To understand this argument, one must first note that the ITAR’s fundamental research exemption arises through a set of nested definitions. The ITAR applies to technical data, and then exempts certain technical data definitionally, as follows:

- a. ITAR exempts from the definition of technical data “information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain as defined in [22 CFR] § 120.11.”
- b. Section 120.11 provides that

“Public domain means information *which is published* and which is generally accessible or available to the public:

* * * * *

(8) [t]hrough fundamental research in science and engineering at accredited institutions of higher learning in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community.” (emphasis added).

Note, therefore, that the exemption applies only to information *which is published* through fundamental research where information *is ordinarily published*.

So, while the ITAR exemption incorporates the NSDD 189⁴ concept of “ordinarily published and shared broadly in the scientific community,”⁵ it

⁴ National Security Decision Directive 189 is a 1985 Presidential policy providing that classification provides the only means for restricting federally funded fundamental research. See

is prefaced with a clause that provides that public domain information “is published.” The phrase “ordinarily published” applies not to the information at issue, but is instead descriptive of the general *means* of publication—fundamental research.

- c. Note that, in contrast, the EAR doesn’t require actual or planned publication, although that is one means for exemption from the EAR, 15 CFR §§ 734.3(b)(3)(i), 734.7. Not only does the EAR fundamental research exemption hew to the “ordinarily published” standard, 15 CFR § 734.8(a), its supplemental questions and answers provide further clarification. Question D(3) (15 CFR Part 734, Supplement No. 1) asks if a university researcher must obtain a license before sharing unpublished research results with a visiting Chinese scientist. The answer provided is “If you performed your research at the university, and you were subject to no contract controls on release of the research, your research would qualify as ‘fundamental research.’ Information arising during or resulting from such research is not subject to the EAR.” (citations omitted).

B. When the sponsor violates the export control rules.

1. For company proprietary information, much of the language in the EAR puts the burden on the company. See, for example, 15 CFR Part 734, Supplement No. 1, Question D(2), which squarely puts the burden on the company to obtain a license before releasing proprietary information to university researchers when the researchers include foreign nationals.
2. But EAR General Prohibition Ten, 15 CFR § 736.2(b)(10), strongly undercuts the idea that universities are absolved when it is the company that is under the licensing requirement. General Prohibition Ten provides that it is prohibited to “proceed[] with transactions with knowledge that a violation has occurred or is about to occur.” So universities can’t simply turn a blind eye to releases from companies to their foreign researchers.
3. Additionally, if companies release their proprietary information to the universities’ US citizens and permanent residents, and those university researchers in turn release the information to foreign national faculty, staff, or students, it will be the university that has violated the export control laws.

C. Biological Material Transfer Agreements [MTAs]

the discussion on Joseph Dennin’s outline for further background and detail, and a copy of the document itself.

⁵ NSDD 189’s language is “research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community.”

1. MTAs from companies (or even from other universities and nonprofits) that provide biological materials almost always have some proprietary information and confidentiality provisions. As such, the restrictions fundamental research exemptions do not apply, to the extent that the information/materials transferred fall within the Commerce Control List [CCL]⁶ or the Munitions Control List [MCL]⁷. As to that proprietary information, the fundamental research will not apply.
2. Several categories of the EAR's CCL refer to biological materials. See in particular: ECCNs 1C351 through 354 (human pathogens, zoonoses, and toxins; animal pathogens; genetic elements and genetically-modified microorganisms; plant pathogens), and the related ECCN 1C991 (vaccines, immunotoxins, medical products, diagnostic and food testing kits (generally items containing items controlled by ECCN 1C351-1C354)).
3. The ITAR's MCL, Category XIV includes "biological agents," without further definition.
4. At least as to the information conveyed to the institution under the confidentiality clause, then, the fundamental research exclusion does not apply, and that information is therefore export controlled.

D. Nondisclosure and confidentiality agreements.

1. Restrictions on the release of information already in existence at the time of the agreement is signed preclude the application of the fundamental research exemption to that information.
2. Restrictions on the release of the results of research preclude the application of the fundamental research exemption to the research as a whole.

E. Proposals and proposal planning, teaming agreements

1. Arrangements to work with other institutions to propose research to the federal government or other sponsors often involve confidentiality provisions. At a minimum, then, the sharing of information under these agreements is often without the protection of the fundamental research exemption.

⁶ The list of technologies that come under the EAR is called the Commerce Control List, and is located at 15 CFR Part 774. The individual categories within the CCL are designated by a series of numbers and letters referred to as the "ECCNs."

⁷ The comparable list of technologies under the ITAR is the Munitions Control List, located at 22 CFR § 121.

F. Articles, objects, and things.

1. The fundamental research exemptions generally apply to information only, at least under the ITAR.
2. Under the ITAR, the exemption resides under the definition of “Technical data,” 22 CFR § 120.10, and is therefore a definitional exemption to data that would otherwise be technical data. The ITAR also applies, however, to “Defense articles,” 22 CFR § 120.6, and “Defense services,” 22 CFR § 120.9, neither of which have a fundamental research exemption. Note that “defense services” includes “the furnishing to foreign persons of ... technical data.”
3. The EAR is slightly more ambiguous and permissive on this point. The fundamental research exemption applies to “publicly available technology and software that ... arise during, or result from, fundamental research,” 15 CFR § 734.3(b)(3). “Technology” is defined in 15 CFR § 772 as “specific information [that] takes the form of ‘technical data’ or ‘technical assistance.’” It does not include articles, objects, and things.
4. Actual transfer of objects within the scope of either the Commerce Control List or the Munitions Control List, will therefore likely fall outside of the fundamental research exemption.

G. Defense Services

1. Under the EAR, it appears that services can fall within the fundamental research exemption. As noted above, “technical assistance” is a subcategory of “technology,” which is eligible for the fundamental research exemption. “Technical assistance may take forms such as instruction, skills training, working knowledge, consulting services.” 15 CFR Pt. 772.
2. Under the ITAR, “defense service” is eligible for the fundamental research exemption only when it consists merely of the furnishing of technical data. 22 CFR § 120.9. More comprehensive defense assistance to foreign persons is not eligible for the fundamental research exemption. Unfortunately, the practical distinction is not always clear between mere provision of technical data and the furnishing of assistance.
3. Section 124.1 of the ITAR (22 CFR § 124.1) provides an extra layer of control over the provision of defense services. In addition to the licensing and registration provision of the ITAR, this section requires the approval of the Office of Defense Trade Controls [ODTC] before defense services are provided. The significance of this to universities relying on the fundamental research exemption for technical data is that the section states that “The requirements of this section apply whether or not technical data is to be disclosed or used in the performance of the defense services ... (e.g., all the

information relied upon by the U.S. person in performing the defense service is in the public domain or is otherwise exempt from the licensing requirements of this subchapter).”

4. It therefore appears that in some circumstances, even though the technical data otherwise qualifies for the fundamental research exemption, the larger context suggests that “defense services” are occurring, and that ODTIC approval is therefore required.

H. Problematic Government Contract Clauses

Remember that under the ITAR, governmental publication restrictions destroy the fundamental research exemption. Many of these clauses are contained in the FAR, or the FAR supplements, or standard agency contract clauses. They are often referenced only by clause number, and may be missed by university contract reviewers. Some of these clauses are listed below.

COGR⁸ has reported that these and similar clauses have been included in contracts to universities from the NIH, the U.S. Army, the NIH, the Centers for Disease Control, and the Agency for Health Research Quality. In some of these cases, the contracts were in the nature of “works for hire,” in which agency retention of control over materials slated for their own internal use is not inappropriate. However, even in those cases, the clauses sometimes also applied to the results of research to be published more widely.

1. Army Clause 52.005-4401 (Release of Information)
 - a. Release of Information, 52.005-4401 (Release of Information) (July 2002)
 - (i) Requires that parties “confer and consult” prior to publication or other disclosure of information related to contract activities. It also references “non-releasable, unclassified information.” These together, in the absence of a clear statement that the consultation doesn’t restrict the recipient’s authority to publish, suggest the fundamental research exemption may be lost.
 - (ii) Former version, date August 2001, explicitly required Army review and approval prior to public release of any information.
2. FAR 52.227-17, Rights in Data—Special Works (June 1987)
 - a. Language:
 - (d) “*Release and use restrictions.* Except as otherwise specifically

⁸ The Council on Government Relations, an association of research universities. See <http://www.cogr.edu/>.

provided for in this contract, the Contractor shall not use for purposes other than the performance of this contract, nor shall the Contractor release, reproduce, distribute, or publish any data first produced in the performance of this contract, nor authorize others to do so, without written permission of the Contracting Officer.”

- b. Some universities have received this clause in contracts, and it has appeared in NIH RFPs. COGR Report, November 2001.
 - c. FAR instructions limit this to when data is being produced for internal government use, and not for contractor research—unclear if that’s how it is actually being used, though.
3. DFARS 252.204-7000, Disclosure of Information (December 1991)
- a. Language:
 - (a) *The Contractor shall not release to anyone outside the Contractor's organization any unclassified information, regardless of medium (e.g., film, tape, document), pertaining to any part of this contract or any program related to this contract, unless-*
 - (1) *The Contracting Officer has given prior written approval; or*
 - (2) *The information is otherwise in the public domain before the date of release.*
 - (b) *Requests for approval shall identify the specific information to be released, the medium to be used, and the purpose for the release. The Contractor shall submit its request to the Contracting Officer at least 45 days before the proposed date for release.*
 - (c) *The Contractor agrees to include a similar requirement in each subcontract under this contract. Subcontractors shall submit requests for authorization to release through the prime contractor to the Contracting Officer.*
 - b. DFARS instructions for this clause are quite broad. Section 204.404-70 instructs defense contract officers to use clause 252.204-7000, Disclosure of Information, in solicitations and contracts when the contractor will have access to or generate unclassified information that may be sensitive and inappropriate for release to the public.
 - c. This derives from of Section 204.4 of the DFARS: “SAFEGUARDING CLASSIFIED INFORMATION WITHIN INDUSTRY.” This clause passes through concepts from classified research with industry into the unclassified context when corporate prime sponsors with classified contracts pass through clause 252.204-7000 to universities.

I. Other problematic contract clauses:

1. Institution promises it will comply with Export Control Laws.

a. Federal contracts.

- (i) This may not be problematic, especially if it is a standard clause inserted into all contracts. For example, the NASA FAR Supplement includes clause **1852.225-70 Export Licenses**, which includes the following language: “(a) The Contractor shall comply with all U.S. export control laws and regulations, including the International Traffic in Arms Regulations (ITAR), 22 CFR Parts 120 through 130, and the Export Administration Regulations (EAR), 15 CFR Parts 730 through 799, in the performance of this contract. In the absence of available license exemptions/exceptions, the Contractor shall be responsible for obtaining the appropriate licenses or other approvals, if required, for exports of hardware, technical data, and software, or for the provision of technical assistance.”

The instructions for the use of this clause state: “Insert the clause at 1852.225-70, Export Licenses, in all solicitations and contracts, except in contracts with foreign entities.”

- (ii) It is worth highlighting such contracts and examining them carefully to make sure that the fundamental research exemption applies.
- (iii) If the research results do not in fact fall under the Munitions Controls List or the Commerce Control List, it may be possible to get the agency to agree to an additional clause so specifying.
- (iv) Alternatively, the agency may agree to specify contractually that the research will fall under the fundamental research exemption.

b. Corporate contracts

- (i) These are problematic. The burden should be on the corporate sponsor to comply with export control laws. Typically, it is the sponsor’s proprietary information which falls under the CCL or MCL. The sponsor should be required to communicate to the institution what information is being conveyed that falls under those regimes, and what sections of the relevant control lists apply. The contract warrants heightened review to make sure that the fundamental research exemptions are retained.

2. Government clauses restricting participation in the research to US citizens and permanent residents. See, for example, Army Clause 52.005-4400 (Foreign Nationals).
 - a. While these don't trigger export control provisions in themselves, they create some of the same harms for universities—limiting full and open participation in the research, and create compliance challenges.
 - b. If the applicability of the export control laws to the particular research is in question, the presence of such a clause may also lend support to the interpretation that the sponsor agency believed that export controls did apply.

II. Compliance Strategies

These strategies are suggestions. Some involve difficult tradeoffs between academic freedom and research opportunities. Some represent extremely conservative compliance positions that have not been implemented by any institutions, to my knowledge, and are so noted. Most represent intermediate positions that offer the advantages of feasibility and efficiency, by identifying and reducing the highest risk situations.

A. Maximize the Applicability of the Fundamental Research Exemption to all Institutional Research

1. Avoid publications restrictions under government contracts involving technology subject to the ITAR.

As noted above, under the ITAR, government contracts that contain publication restriction clauses do not fall within the ITAR's fundamental research exemption. It is important for contract reviewers to be aware of these clauses, and call them to counsel's attention. Strategies for fighting these clauses include:

- a. Identify the instructions for use of the clause in the FAR or agency manuals. Often, the criteria for use of the clause will not have been met, and this provides a strong basis for arguing to have the clauses removed.
- b. Call NSDD 189⁹ to the attention of the contracting officials and argue that nonclassified information should not be subject to restrictions on dissemination. Often the contracting officer professes ignorance of NSDD 189.
 - (i) Use regulatory reflections, reiterations, and implementations of NSDD 189.

⁹ See text at note 4 above.

(A) The regulations designating the three levels of classified information (Top Secret, Secret and Confidential)¹⁰ provide that:

Only three designations of classification are authorized. 22 CFR § 9.5(a).

No other phrase shall be used in conjunction with those three. § 9.5(a)(3)

(B) The preface to the March 29, 2002 ITAR amendment reaffirmed NSDD 189. It states that “Consistent with NSDD 189, the Department does not regulate fundamental research. ... [P]ublicly available information and academic exchanges are not treated as controlled technical data.” 67 Fed. Reg. 15099-15100 (March 29, 2002).

(C) DoD implementation

32 CFR 249.4(c) “It is DoD policy to: * * * allow the publication and public presentation of unclassified contracted fundamental research results. The mechanism for control of information generated by DoD-funded contracted fundamental research ... performed under contract or grant at ... universities ... is security classification. No other type of control is authorized unless required by law.”

See similarly DoD Instruction No. 5230.27, Section 4.3 (See <http://www.dtic.mil/whs/directives/corres/ins1.html>).

(ii) Remind the agency official that NSDD 189 was reaffirmed after September 11, 2001, by National Security Advisor Condoleezza Rice. See Joseph Dennin’s outline and the attachments thereto.

- c. Accept prior review of publications, but negotiate out giving the agency the actual power to restrict publication.
- d. Work with the principal investigator to determine whether the research can be carried out without access to sensitive information, and then restructure the statement of work accordingly.
- e. If the clause cannot be defeated, the institution will need to analyze whether the subject matter of the research is such that it falls under either the EAR or the ITAR, and, if so, initiate compliance measures, including, if necessary, restricting the involvement of foreign nationals.
 - (i) Consider whether the information can be partitioned so that the Principal Investigator alone gets access to the controlled

¹⁰ See Joseph Dennin outline.

information, thereby allowing foreign national faculty, staff, and students to participate.

2. Never accept publication restrictions beyond those in the EAR from private sector sponsors and research partners.¹¹
 - a. This is usually achievable in negotiations, and is generally consistent with universities' negotiating positions, even absent export control situations.
 - b. A general policy statement articulating your negotiating posture will be helpful to your contract negotiators. See the discussion in Joseph Dennin's outline under "Universities' 'Openness in Research Policy,'" which discusses such policy statements at three institutions.

3. If the research involves ITAR-controlled information, do not accept any publication restrictions whatsoever.

This will be difficult to negotiate, but note that the normal publication restrictions could well put your institution outside of ITAR's fundamental research exemption, as discussed earlier.

4. Do not conduct research that would constitute defense services under the ITAR or result in the production of defense articles.¹²

This strategy obviously carries policy implications. For some institutions, the increase in compliance security would not be worth the sacrifice in contracting opportunity.

B. Review all contracts involving confidentiality/proprietary information for CCL/MCL content

1. Since confidential/proprietary information will not itself fall within the fundamental research exemption, all such information should be reviewed to determine whether it falls under the EAR or the ITAR.
2. If it does, security controls need to be implemented to avoid disclosure of the proprietary information to or access by noneligible unlicensed foreign nationals.
 - a. Determine which nationalities require licensing under the relevant CCL/MCL provisions.

¹¹ Remember that the EAR fundamental research exemption allows two restrictions on publication: review to identify proprietary information, and review for purposes of allowing temporary delay to file patent applications.

¹² As discussed earlier, the fundamental research exemption does not apply to defense articles or to defense services under the ITAR.

- b. Either license or exclude nationals of such countries, if any.
3. As of this writing, I am not aware of any institution taking this comprehensive approach.

C. Review all research involving confidentiality/proprietary information to determine the involvement of foreign nationals.

1. If foreign nationals will be involved, determine whether the confidential proprietary information falls under the CCL or MCL. If it does, security controls need to be implemented to avoid disclosure of the proprietary information to or access by noneligible unlicensed foreign nationals.
 - a. Determine which nationalities require licensing under the relevant CCL/MCL provisions
 - b. Either license or exclude nationals of such countries, if any.
2. This approach may be more pragmatic. It may be easier to ascertain the nationalities of participants in research projects than to conduct a CCL/MCL analysis. But one must be careful of the risk of discrimination on the basis of national origin.

D. Shift the burden of compliance to corporate research partners contractually.

As noted above in Section I.B, this will not remove all compliance obligations. It does, however, increase the odds of corporate compliance, thereby reducing the likelihood that your institution will be a participant in a violation. Moreover, it will reduce the likelihood of controlled information or technology coming onto your campus, thereby reducing the likelihood of a secondary violation on campus. Different variants on this strategy are as follows:

1. Explicitly require all contractors not to share MCL/ECCN information/materials.
 - a. As of this writing, no institution has adopted this as a uniform policy. Most university counsel believe that this would create too many barriers to contracting.
 - b. A slightly more moderate approach would be to impose such a requirement only when there are confidentiality clauses. Even this more moderate approach has not been adopted by any institution, to my knowledge.

- c. A variant on this strategy used by some institutions is to negotiate for such requirements in the following circumstances
 - (i) when it is known that the research involves controlled technology
 - (ii) when the outside entity initially proposed that the institution assume export control compliance obligations in connection with the research.
2. Never agree to assume compliance for export control compliance in connection with information, services, or articles received from an outside entity.
 - a. Generally, neither your university nor your researcher are in a position to evaluate incoming information, services, or articles to determine MCL/ECCN status. The originating entity is usually in a much better position to do so.
 - b. As a practical matter, once the contracting phase ends, the institutional researcher and the outside entity's personnel will be exchanging information regularly, so that there will be no opportunity for export control analysis of incoming data.
3. Negotiate for the company to bear the administrative and/or financial burdens of applying for licenses for transferring controlled technology.

If you do decide to accept controlled technology, and licenses will be required, you want to shift the burden to the company provider. At a minimum, the provider should identify the controlled technology, and identify the ECCN/MCL designations. Preferably, the provider also actually obtains the license (with cooperation from the university) and pays all license and attorney fees.

This method may be used:

- a. As a fail-safe in a contract setting in which the company possesses controlled technology, and promises not to release it. The clause would state that if such technology is nevertheless released, the company will assure compliance. This provides some insurance against company-investigator collusion.
- b. Where it is known and agreed that controlled technology will be transferred to the institution, and foreign nationals will be involved.
- c. Where it is known and agreed that controlled technology will be transferred to the institution, and foreign nationals will not initially be involved. Universities should not restrict the investigator's flexibility to bring in students or colleagues who may be foreign nationals. The clause

should provide for the company to obtain a license in those circumstances.

4. Make a policy announcement and publish a brochure to the effect that the institution expects export control compliance to be the responsibility of the outside entity originating the information. UNM is contemplating language such as the following:

UNM considers export control compliance to be the obligation of the provider of the information or material. UNM research frequently involves the participation of foreign nationals, and the sharing of information internationally, and UNM will therefore assume that information provided is not export controlled. Any transfer of export controlled information or material must be made under careful procedures arranged and approved by [the Administration].

E. Risk management strategy.

Review all research involving a high risk of export control violation, either because the situation involves foreign nationals, or because the technology is such that the consequences from violation could be high. Focus your compliance efforts on these areas to identify problems, and then employ one of the other strategies to resolve them.

1. Check for defense services and articles, which are not subject to the fundamental research exemption. Ascertain and evaluate the specific technologies involved in order to determine applicability of the CCL/MCL.
2. Audit research in high risk technological areas
 - a. Biological agents
 - b. Satellite related technology
 - c. Nuclear technology
3. Screen all research with foreign involvement
 - a. International collaborations
 - b. Delivery of technological services overseas
 - c. Foreign sponsor/contracting entity
 - (i) MTA provider/recipient

- (ii) Subawardee
- (iii) Confidential information provider/recipient under NDA

F. Implement compliance plans for at least high-risk research that doesn't fall within the fundamental research exemptions.

When all else fails, you must either license foreign nationals as required by the EAR and ITAR, or exclude such foreign nationals.

III. Militarily Critical Technology

A. DoD Form 2345, Militarily Critical Technical Data Agreement

1. Allows access to unclassified data that is withheld from the public under DoD Directive 5230.25, where such access is necessary to propose or perform research. Access is provided to database of nonclassified but nonpublic technical reports. See <http://www.dlis.dla.mil/jcp/documents.htm>.

B. Individual employees can execute Form 2345 for themselves.

1. If they disclose the data they get under the agreement to foreigners or otherwise violate export control laws, criminal liability can result.
2. Control procedures for Militarily Critical Technology are contained at http://www.dlis.dla.mil/jcp/forms/Control_Procedures.pdf.

C. Compliance

1. Proposals submitted using Form 2345 information may result in contracts that don't necessarily explicitly incorporate the control procedures. These may therefore slip below the radar of your institution's contract control procedures.
2. The best way to identify these risks is to determine whether Form 2345s have been executed on behalf of your institution, and then following up with the signers. You can search on the web to see Form 2345's have been executed on behalf of your institution: <http://www.dlis.dla.mil/jcp/search.htm>.